

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

PHILIP H. COHN,)
vs.)
Petitioner/Defendant,) CIVIL NO. 06-cv-762-MJR
vs.) CRIMINAL NO. 04-cr-04-30051
UNITED STATES of AMERICA ,)
Respondent/Plaintiff.)

MEMORANDUM AND ORDER

REAGAN, District Judge:

This matter is before the Court on Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence. This motion was filed by Petitioner, *pro se*, and the Government has not filed written responses to this motion. For the reasons set forth below, the motion is denied.

Petitioner entered into a plea agreement with the Government in an attempt to benefit himself. In exchange for the benefits he received, Petitioner waived his right to a direct appeal and to a collateral attack under Section 2255. Specifically, the plea agreement provides in relevant part:

The Defendant understands that by pleading guilty, he is waiving all appellate issues that might have been available if he had exercised his right to trial. The Defendant states that he is fully satisfied with the representation he has received from his counsel, that they have discussed the Government's case, possible defenses and have explored all areas which the Defendant has requested relative to the Government's case and his defense.

The Defendant is aware that Title 18, Title 28 and other provisions of the United States Code afford every defendant limited rights to contest a conviction and/or sentence. Acknowledging all this, and in exchange for the recommendations and concessions made by the United States in this plea agreement, the Defendant knowingly and voluntarily waives his right to contest any aspect of his conviction and sentence that could be contested under Title 18 or Title 28, or under any other provision of federal law. Defendant knowingly and voluntarily waives his right to

seek a pardon, whether before or after his release from custody.

Defendant's waiver of his right to appeal or bring collateral challenges shall not apply to: 1) any subsequent changes in the interpretation of the law by the United States Supreme Court or the United States Court of Appeals for the Seventh Circuit, which is declared retroactive by those Courts, and which renders the Defendant actually innocent of the charges covered herein, and 2) appeals based upon the Sentencing Guidelines amendments which are made retroactive by the United States Sentencing Commission (see U.S.S.G. § 1B1.10). The Government reserves the right to oppose such claims for relief.

[. . .]

The Defendant waives any challenges to the constitutionality of the United States Sentencing Guidelines. The Defendant waives any right to have facts that determine his offense level under the Guidelines be alleged in an indictment and be found by a jury beyond a reasonable doubt. The Defendant agrees that facts that determine his Sentencing Guideline offense level will be found by the Court at sentencing by a preponderance of the evidence.

Plea agreement at ¶ II-14 (Doc. 48, criminal case).

The Seventh Circuit has held that "a waiver of a right to appeal contained within a guilty plea is enforceable," provided the waiver is knowing and voluntary. *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir.), *cert. denied*, 117 S.Ct. 2467 (1997); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995). *See also United States v. Wenger*, 58 F.3d 280, 281 (7th Cir.), *cert. denied*, 116 S.Ct. 349 (1995). A waiver will not be enforced, however, if the district judge relied on impermissible facts in sentencing (for example, the defendant's race or gender) or if the judge sentenced the defendant in excess of the statutory maximum sentence for the offense committed. *Feichtinger*, 105 F.3d at 1190.

Similarly, the Seventh Circuit has found that a waiver of Section 2255 relief in a plea agreement is enforceable, and should be treated no differently than the waiver of a direct appeal. *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999). Indeed, the Seventh Circuit has

specifically stated that both statutory and constitutional rights can be waived in a plea agreement. *Id.* at 1144; *United States v. Woolley*, 123 F.3d 627, 631-32 (7th Cir. 1997); *Feichtinger*, 105 F.3d at 1190.

In this case, Petitioner states two grounds for relief: (1) that counsel was ineffective for failing to file an appeal after the reduction of his sentence pursuant to Fed. Rule Crim. P. Rule 35(b), and (2) that Petitioner's sentence violates the holding in *United States v. Booker*, 543 U.S. 220 (2005), in that the Court sentenced Petitioner to a longer sentence than that recommended in the plea agreement by a four-point sentence enhancement and that the sentence reduction Petitioner received pursuant to Rule 35 did not make up for the Court-imposed enhancements. Neither of these grounds fall under either of the two exceptions to the waiver listed above. Furthermore, Plaintiff specifically waived his right to bring the challenge in Ground 2 in the last paragraph of the plea agreement, which states: "The Defendant agrees that facts that determine his Sentencing Guideline offense level will be found by the Court at sentencing by a preponderance of the evidence." Consequently, there is no basis in the record for avoiding this waiver.

Because the waiver provisions of the plea agreement are enforceable, Petitioner has waived any right to bring this Section 2255. Accordingly, Petitioner's motion pursuant to 28 U.S.C. § 2255 is **DENIED**, and this action is **DISMISSED** with prejudice.

IT IS SO ORDERED.

DATED this 24th day of October, 2006.

s/ Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge